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ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2002

No. 02-10038

FILED
APR 8 2003

ROBERT JAMES TENNARD,

Petitioner,

v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

APR 8 2003

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Motion for Leave to Proceed *in Forma Pauperis*

Petitioner, Robert James Tennard, respectfully requests that the Court permit him to proceed *in forma pauperis* on his Petition for Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit, to which this motion is attached.

Mr. Tennard is now and has always been eligible to proceed in the federal courts as a pauper. In the most recent proceedings in the United States Court of Appeals for the Fifth Circuit and in the United States District Court for the Southern District of Texas, counsel was appointed for Mr. Tennard in both courts pursuant to 21 U.S.C. § 848(q)(4)(B) (requiring

(10)

appointment of counsel in capital federal habeas corpus proceedings for a person "financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services"). In connection with his petition for writ of certiorari, which the Court granted on October 7, 2002, the Court granted his motion to proceed *in forma pauperis*.

WHEREFORE, petitioner respectfully requests that the Court grant leave for him to proceed *in forma pauperis*.

Respectfully submitted.

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ROBERT JAMES TENNARD
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JANIE COCKRELL, Director,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CAPITAL CASE

QUESTIONS PRESENTED

1. Is the Fifth Circuit's rule requiring a "nexus" to the crime before evidence of impaired intellectual functioning and judgment can be considered as mitigation for purposes of determining whether there is a violation of *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), inconsistent with the rationale of *Atkins v. Virginia*, 122 S.Ct. 2242 (2002)?

2. Did the Fifth Circuit err in resolving the plainly substantial question of the effect of *Atkins* on the Fifth Circuit nexus rule by denying a COA, rather than granting a COA and giving the substantive issue the merits consideration it deserves?

PARTIES TO THE PROCEEDINGS IN THE LOWER COURTS

The caption of the case contains the names of all parties to the proceedings in the lower courts and here.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Robert James Tennard respectfully requests that the Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in his capital federal habeas corpus proceeding.

OPINION BELOW

The Fifth Circuit's opinion is reported as *Tennard v. Cockrell*, 317 F.3d 476 (5th Cir. 2003). It is attached hereto as Appendix 1.

JURISDICTION

On October 7, 2002, the Court granted Mr. Tennard's petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, vacated the Fifth Circuit's judgment in *Tennard v. Cockrell*, 284 F.3d 591 (5th Cir. 2002), and remanded "for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)."

On January 3, 2003, without requesting briefing from the parties and without prior notice to the parties, the Fifth Circuit announced its opinion on remand. *Tennard v. Cockrell*, 317 F.3d 476. No petition for rehearing was filed.

The Court has jurisdiction to review the decision of the Fifth Circuit pursuant to 28 U.S.C. § 1254(1) and Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the Eighth Amendment to the Constitution of the United States, which provides in relevant part, "nor [shall] cruel and unusual punishments [be] inflicted," and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

COURSE OF PROCEEDINGS

Robert Tennard was convicted of capital murder and sentenced to death in Harris County, Texas, in October 1985. The Texas Court of Criminal Appeals (CCA) affirmed his conviction and sentence. *Tennard v. State*, 802 S.W.2d 678 (Tex. Crim. App. 1990), *cert. denied*, 501 U.S. 1259 (1991). Thereafter, Mr. Tennard sought habeas corpus relief in the state courts. On December 18, 1997, the CCA denied relief on Mr. Tennard's state habeas application in a 6-3 decision. *Ex parte Tennard*, 960 S.W. 2d 57 (Tex. Cr. App. 1997).

Mr. Tennard filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Texas on December 18, 1998. The district court denied the petition on July 25, 2000. Mr. Tennard filed a timely notice of appeal and requested a certificate of appealability (COA). On March 1, 2002, a panel of the United States Court of Appeals for the Fifth Circuit court denied a COA in a 2-1 decision. *Tennard v. Cockrell*, 284 F.3d 591 (5th Cir. 2002).[1] Rehearing was denied on April 4, 2002.

A timely petition for writ of certiorari was thereafter filed, and as noted, the Court granted the petition, vacated the judgment of the Fifth Circuit, and remanded for further consideration of Mr. Tennard's case. On remand, the Fifth Circuit reinstated its previous opinion. *Tennard v. Cockrell*, 317 F.3d 476.

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[1]This opinion is attached as Appendix 2.

STATEMENT OF FACTS

A. ***Guilt Phase of Mr. Tennard's Trial***

The guilt phase evidence established that Mr. Tennard and two other men robbed and murdered Larry Neblett and Chester Smith, who were acquaintances of Tennard. Mr. Tennard was convicted of the capital murder of Larry Neblett.

B. ***Penalty Phase of Mr. Tennard's Trial***

Mr. Tennard's jury was required to answer the same special issues on deliberateness and future dangerousness as were at issue in *Penry I*:

> 1. Was the conduct of the defendant that cause the death of the deceased committed deliberately, and with the reasonable expectation that the death of the deceased or another would result?
>
> 2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

Affirmative answers to both questions required imposition of the death sentence.

The State's penalty phase evidence was directed at the special issue on future dangerousness. According to the state's evidence, Mr. Tennard was convicted of rape at age 16 and was in prison from 1979 until he was released on parole in April, 1985. The complainant in the rape case testified that Tennard had been one of three men who sexually assaulted her. SF 29:27-46.[2] She also testified that Tennard allowed her to go to the restroom to take a bath based on her assurance that she would not try to escape. While in the bathroom, she left through a window. On cross-examination, defense counsel brought out a prior statement in which the

[2]References to the trial transcript, in Texas called the "statement of facts," are "SF" followed by the volume and page number of the statement of facts.

complainant indicated that one of the other men who assaulted her, and not Tennard, was the leader. *Ex parte Tennard*, 960 S.W.2d at 58-59.

Tennard's *only* penalty phase witness was William Kinard, his parole officer. SF 29:56. Kinard identified "records of Tennard's IQ level according to the Texas Department of Corrections' records." *Id.* According to those records, Mr. Tennard had an IQ of 67. *Id.* at 58. Mr. Kinard testified that as a matter of course the Texas Department of Corrections administers tests to determine the inmate's I.Q. *Id.* at 58.

Both the prosecution and defense discussed Tennard's I.Q. evidence in closing arguments. The prosecutor preemptively attempted to downplay the evidence: "I'm sure the defense is going to ask you to forgive this man for what he's done. Say that he has a low I.Q. and that you should give him another chance." *Id.* at 72. He urged the jury instead to make its decision "based on the facts," and he argued extensively why the evidence justified affirmative answers to the two special issues. He did not treat the I.Q. evidence as relevant to either special issue.

Defense counsel did indeed argue that Mr. Tennard's impaired intellectual functioning, as evidenced by his low I.Q. and naivete, and his poor upbringing called for a life sentence instead of death. He repeatedly urged the jury to take into consideration Tennard's impaired intellectual functioning. *Id.* at 85, 93-94. He reminded the jury that the evidence was not in dispute:

> Then I called a witness who testified he's Tennard's parole officer. Uncontroverted evidence that when Robert Tennard was examined, when he got out of the penitentiary, by the officials who determined how to classify him, how to treat him, the same information that was communicated to his parole officer. . . . Information that the prison psychiatrist had. . . is that Tennard has got a 67 I.Q.

Id. at 85.

Defense counsel then argued that Tennard's behavior bore the mark of a man with significantly impaired intellect, as confirmed by his low I.Q. score:

> The same guy that told this poor unfortunate woman [the rape victim] that was trying to work that day, 'Well, if I let you in there, will you leave?' And he believed her. This guy with the 67 I.Q., and she goes in and, sure enough, she escapes, just like she should have. That is uncontroverted testimony before you, that we have got a man before us that has got an intelligence quotient . . . *that is that low*. [Emphasis added].

Id. Referring to his subnormal I.Q., defense counsel challenged the jury

> to judge [Tennard] as his peers. That's going to be hard for you to do. None of you grew up where he grew up. Only one of you is black and *none of you are suffering from a 67 I.Q.*

Id. at 93 (emphasis supplied). He reminded the jury,

> T]he law allows you to take all the things into consideration that I talked to you about -- attitude toward the death penalty, take all these things into consideration, the 67 I.Q. -- in deciding how you answer those questions. You have a right to do that under Texas law.

Id. at 94.

The prosecutor responded that although Tennard's low I.Q. might explain his conduct, the jury must disregard that evidence under the instructions.

> *[T]he reasons why he became a danger are not really relevant*. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question.

Id. at 98 (emphasis added).

The jury answered both issues affirmatively, and Tennard was sentenced to death.

HOW THE ISSUES WERE DECIDED BELOW

A. *State Habeas Proceedings*

In state habeas proceedings, Mr. Tennard raised a claim under *Penry v. Lynaugh*, 492

U.S. 302 (1989) *(Penry I)*, arguing that the Texas special issues on deliberateness and future dangerousness did not provide a vehicle for giving effect to his mitigating evidence. Despite uncontradicted evidence that Mr. Tennard had an I.Q. of 67 and behavioral traits consistent with mental retardation, a majority of the Texas court found that there was "no evidence in this record that applicant is mentally retarded," and thus, Tennard was not entitled to a special instruction under *Penry*. *Id.* at 61. In a plurality opinion, Presiding Judge McCormick concluded that even if "applicant's low I.Q. somehow falls within Penry's definition of mental retardation," Mr. Tennard would not have been entitled to a *Penry* instruction because he did not establish that "his low IQ rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low IQ rendered him unable to learn from his mistakes or diminished his ability to control his impulses or to evaluate the consequences of his conduct." *Ex parte Tennard*, 960 S.W.2d at 62. Without considering the way in which Tennard's low I.Q. evidence was presented and argued by the defense, the Texas court also held the jury was able to give effect to the evidence under the Texas special issues; thus a special instruction under *Penry I* was not required. *Id.* at 62-63. *See also Tennard v. Cockrell*, 284 F.3d at 598 (dissenting opinion).

B. *The Fifth Circuit's Initial Decision in Federal Habeas Proceedings*

In a 2-1 decision denying a COA, the Fifth Circuit accorded a presumption of correctness to the Texas court's finding that there was no evidence in the record that Tennard was mentally retarded, relying heavily on previous Fifth Circuit decisions that "a low I.Q. does not constitute a uniquely severe condition or is within the jury's effective reach pursuant to the teachings of *Penry*." *Tennard v. Cockrell*, 284 F.3d at 596. In the alternative, the panel majority held that

Mr. Tennard was not entitled to relief on his *Penry I* claim because he did not demonstrate at trial that his crime was directly attributable to mental retardation. *Id.* at 596-597.

Judge Dennis, dissenting, reasoned that the merits of Mr. Tennard's claim are "squarely governed" by *Penry I*. *Id.* at 597. Judge Dennis concluded that "Tennard is entitled to relief under 28 U.S.C. § 2254(d)(1) because the decision of the Texas Court of Criminal Appeals rejecting his *Penry I* claim is based on rationales that were rejected generally and specifically by *Penry I*." *Id.* at 601.

With respect to the panel majority's alternative holding, Judge Dennis argued that the circuit's "nexus" decisions are based upon dicta explaining the historical, moral, and social principles underlying *Lockett v. Ohio* 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and not the holding in *Penry I*, and thus cannot serve as precedent under 28 U.S.C. § 2254(d)(1). In support of this principle, Judge Dennis relied on the analysis in *Williams v. Taylor*, 529 U.S. 362, 412 (2000), that § 2254(d)(1) "'refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision.'" *Tennard*, 284 F.3d at 604, quoting *Williams*.

C. *The Fifth Circuit's Decision on Remand*

In his previous petition for writ of certiorari to the Fifth Circuit, Mr. Tennard argued that he was in the same position as Johnny Penry after Penry's first trial and that he was entitled to relief under *Penry I*. Tennard also attacked the Fifth Circuit's use of its "nexus" rule to deny relief, arguing that the then-recent decision in *Atkins v. Virginia* established as a matter of law that mental retardation, or the kind of impaired intellectual functioning and judgment that Tennard exhibited – which was consistent with mental retardation, was mitigating and thus made

the use of the nexus rule in a case like his inappropriate. In keeping with this argument, the Court granted Mr. Tennard's petition, vacated the Fifth Circuit judgment, and remanded for further consideration of Tennard's case in light of *Atkins*.

On remand, the Fifth Circuit never set a briefing schedule. Without prior notice, on January 3, 2003, the court issued a short opinion setting forth the following:

> In *Atkins*, the Supreme Court held that the Eighth Amendment prohibits the application of the death penalty to mentally retarded persons. Tennard has never argued that the Eighth Amendment prohibits his execution. Instead, Tennard argued that the jury instructions did not provide a vehicle for giving mitigating effect to his evidence of mental retardation in violation of the Eighth Amendment. Accordingly, because Tennard has not raised the Eighth Amendment claim addressed in *Atkins*, such a claim is not properly before us.

Tennard v. Cockrell, 317 F.3d 476. For this reason, the Fifth Circuit reinstated its panel and affirmed the district court judgment. Judge Dennis joined the panel's remand opinion but reasserted his dissent from the original panel opinion. *Id.*

REASONS FOR GRANTING CERTIORARI

I. THE FIFTH CIRCUIT FAILED TO UNDERTAKE THE FURTHER REVIEW THAT THIS COURT DIRECTED IN ITS ORDER OF OCTOBER 7, 2002.

The Fifth Circuit failed to do what the Court directed on the remand in Mr. Tennard's case. It did not consider the effect of *Atkins v. Virginia* on its resolution of the *Penry* issue presented by Mr. Tennard. Apparently assuming that this Court was misled into thinking that Tennard had presented a claim that he should not be executed because he was mentally retarded – an "*Atkins* claim" – the Fifth Circuit gave no further consideration to Mr. Tennard's *Penry* claim in light of *Atkins*. This Court should undertake that consideration, or remand again to the Fifth Circuit with an explicit direction that it consider Mr. Tennard's *Penry* claim further in light of

Atkins.

Mr. Tennard's argument is just as compelling today as it was when the Court ordered further consideration on October 7, 2002.

The Fifth Circuit's "nexus" rule precluded relief for Mr. Tennard because "he made no showing at trial that the criminal act was attributable to this severe permanent condition." *Tennard v. Cockrell*, 284 F.3d at 596. Thus, in the view of the Fifth Circuit a capital defendant's evidence of mental retardation or low IQ and associated behavioral deficits does not qualify as constitutionally relevant mitigating evidence unless the defendant can demonstrate that the capital crime is in fact the product of such intellectual impairments. *See Harris v. Johnson*, 81 F.3d 535, 539 n. 11 (5th Cir. 1996); *Davis Scott*, 51 F.3d 457 (5th Cir. 1995).

This rule does not find support in any decision of the Court. Moreover, it is in direct conflict with the rationale underlying the holding in *Atkins v. Virginia*.

The Fifth Circuit's "nexus rule" is a circuit-crafted rule that evolved from Justice O'Connor's observations for the Court in *Penry I* regarding the historical underpinning of the *Lockett* and *Eddings* rule.[3] As the dissenting opinion of Judge Dennis points out, however, the

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[3]The Court observed in *Penry I*.

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse."

492 U.S. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) (emphasis supplied).

passage is clearly dicta and not a part of the holding in *Penry*. *Tennard*, 284 F.3d at 604. As such, it is not a proper basis for determining the merits of a *Penry* claim.

The Fifth Circuit first required a causal connection between proffered mitigating evidence and a capital defendant's crime in *Graham v. Collins*, 950 F.2d 1009 (5th Cir. 1992). In *Graham* and the cases that followed, the court continued to require a "nexus," but it recognized that evidence of mental retardation tended to establish a nexus in and of itself. As the court explained, "*Penry* type disability evidence ... can reduce culpability where it is *inferred* that the crime is attributable to the disability . . . [while] good character evidence provides no variety of 'excuse.'" *Id.* at 1033. (Emphasis added). This approach was followed for a short time thereafter.[4]

In *Madden v. Collins*, 18 F.3d 304 (5th Cir. 1994), however, the court imposed a more stringent "nexus" requirement when determining whether proffered evidence about a capital defendant's character and background qualifies as constitutionally relevant mitigating evidence. Under the *Madden* rule, character and background evidence does not qualify as constitutionally relevant mitigating evidence *unless* the defendant can affirmatively demonstrate that the factors underlying the proffered evidence "[are] directly responsible for the instant crime." *Id.* at 307.[5]

---

[4]*See Russell v. Collins*, 998 F.2d 1287, 1292 (5th Cir. 1993) ("While 'attribution' does not require a precise nexus between such background evidence and the crime, at a minimum the evidence must permit a rational jury to 'infer that the crime is attributable,' at least in part, to the defendant's background"); *Motley v. Collins (Motley I)*, 3 F.3d 781, 791 (5th Cir. 1993). ("If a jury could reasonably infer, based on the evidence at trial, that the crime is in some way attributable to disadvantaged background, no more specific nexus is required under our precedent").

[5]Applying this new rule to Madden's evidence of personality disorder, long term drug abuse, diminished mental capacity, learning disability, and troubled childhood, the court held that because Madden had not demonstrated that any of these conditions and or circumstances

The only authority cited for the *Madden* rule is Justice O'Connor's historical observations in *Penry I*. *Id.*

In developing and applying this "nexus" requirement, the Fifth Circuit ignored years of this Court's precedent which holds that a capital sentencer "may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604. Never has the Court limited the consideration of mitigating circumstance to factors that produced the crime.[6]

The reason for this is obvious. A rational jury may infer that child abuse, severe deprivation, and mental retardation – or as here, an extremely low IQ coupled with behavioral deficits that are associated with low intellectual functioning – lessen a defendant's personal or moral culpability for a violent crime. The crime may not have been directly "attributable" to such factors, but the person who has endured these experiences or suffered such impairments is considered less blameworthy for criminal behavior. As Chief Justice Rehnquist observed in a different context with respect to child abuse, "It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens." *Santosky v. Kramer*, 455 U.S. 745, 789 (1982) (Rehnquist, J. dissenting).

The decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002), makes this point explicit for capital defendants who suffer from mental retardation. The basis for the decision that the Eighth Amendment no longer sanctions the death penalty for mentally retarded offenders was that "today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* at 2249, and that while "[mentally retarded capital offender's] deficiencies do not warrant an exemption from criminal sanctions, ... they do diminish their personal culpability." *Id.* at 2250-2251. Accordingly, the Court recognized that certain factors in and of themselves reduce a capital offender's moral culpability even if there is no evidence that such factors directly contributed to the commission of the crime.

When applied to evidence of mental retardation, the Fifth Circuit's nexus rule thus perpetuates, rather than remedies, *Penry* violations. The facts of Mr. Tennard's case illustrate this vividly. The prosecutor acknowledged in his argument to Tennard's jury that Tennard's low IQ might be "a reason why he became a danger" but then argued that such reasons "are not really relevant." Thus, he argued,

[W]hether [Tennard] has a low I.Q. or not is not really the issue. Because the

were the direct cause of his crime, his evidence did not qualify as constitutionally mitigating evidence. Thus, it did not matter whether or not the evidence could be considered within the scope of the special issues. *Id.* at 308.

[6] *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) ("the fundamental respect for humanity underlying the Eighth Amendment [] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death"); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (holding that a sentencer may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death); *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J concurring) ("[T]he sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime"); *Penry I*, 492 U.S. at 327-28 ("[I]t is precisely because the punishment should be directly related to the personal moral culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense"); *Walton v. Arizona*, 497 U.S. 639, 663 (1990) (Scalia, J. dissenting) ("[w]hatever evidence bearing on the crime or the criminal the defendant wishes to introduce as rendering the defendant less deserving of the death penalty must be admitted into evidence and considered by the sentencer.") The Court has not suggested in any of these cases that constitutionally relevant mitigating evidence is limited to evidence that has a direct causal connection to the crime.

> legislature, in asking you to address that question, [said that] *the reasons why he became a danger are not really relevant*. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question.

SF 29:98 (emphasis added).

This argument gave emphasis to what the jury already could well have ascertained on its own. The evidence of Tennard's low intellectual functioning could well have been considered as a reason for finding that Tennard posed a risk of future danger, because his impaired functioning led him to commit crimes. Thus, this evidence could have been considered in relation to future dangerousness – but only in support of it, as the Court recognized in *Penry I*. The Fifth Circuit's nexus rule, which approves the exclusion of impaired intellectual functioning from consideration as mitigation unless that impairment produces the crime, thus has the effect of exacerbating the *Penry* violation. The jury is allowed to give the evidence aggravating effect in considering future dangerousness but is unable to give it mitigating effect unless it produced the crime. This result simply cannot be reconciled with *Atkins*' recognition that mental retardation is inherently mitigating.

Accordingly, when the evidence establishes in a pre-*Penry* Texas capital trial that the defendant suffers from a 67 IQ and from at least some of the impairments associated with mental retardation, that evidence must be considered as mitigating under the Eighth Amendment. Even if there were a requirement that mitigating factors somehow contributed to the capital crime for such factors to be considered constitutionally mitigating, *Atkins* has established unequivocally that the kind of impairments suffered by Mr. Tennard are, as a matter of law, mitigating. People with such impairments are "categorically less culpable than the average criminal."

For these reasons, the Fifth Circuit's nexus rule cannot stand in the way of relief for Mr.

Tennard under *Penry I*.

II. REINSTATING ITS PREVIOUS OPINION, RATHER THAN RECONSIDERING TENNARD'S *PENRY* ISSUE ON REMAND, THE FIFTH CIRCUIT VIOLATED THE RULE OF *MILLER-EL V. COCKRELL*, 123 S.CT. 1029 (2003).

In *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003), the Court considered a capital habeas decision, also from the Fifth Circuit, in which the Fifth Circuit denied a certificate of appealability (COA) under 28 U.S.C. § 2253(c) by considering and deciding the merits of the claim presented rather than whether that claim satisfied the standard for granting a COA. The Court "reiterate[d] that a prisoner seeking a COA need only demonstrate 'a substantial showing of the denial of a constitutional right.' 28 U.S.C. § 2253(c)(2)." 123 S.Ct. at 1034, and explained.

> A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.

Id. (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The Court then held that when a court denies a COA by deciding the merits against the petitioner it does so in violation of 28 U.S.C. § 2253(c) and, in effect, without jurisdiction:

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. . . . This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief.

Id. at 1039.

In its initial opinion in Mr. Tennard's case, the Fifth Circuit did exactly what it did in Mr. Miller-El's case. It set out the inquiry as whether Tennard's request for a COA should be granted, 284 F.3d at 594, then recited the proper standard for making this determination – "a petitioner 'must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.'" *Id.* (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)) (emphasis in original). The court then conducted a full consideration of the merits of the *Penry* issue presented by Tennard. *Id.* at 595-597. After concluding that Tennard's claim failed on the merits, the court then held "that Tennard has not made a substantial showing of the denial of a constitutional right." *Id.* at 597.

On remand from this Court, the Fifth Circuit could have undertaken a proper COA inquiry, but it did not. All it did, after failing to consider the *Penry* issue further in light of *Atkins*, was "reinstate our panel opinion and AFFIRM the district court's judgment." 317 F.3d 476. Since the original panel opinion suffered from the same defect as the panel opinion in *Miller-El*, the Fifth Circuit's judgment must again be vacated – in light not only of *Atkins* but also, *Miller-El*.

CONCLUSION

For these reasons, the Court should grant certiorari to correct the Fifth Circuit's violation of 28 U.S.C. § 2253(c) and its misapplication of the Eighth Amendment's safeguards.

Respectfully submitted,

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317 F.3d 476
(Cite as: 317 F.3d 476)

United States Court of Appeals.
Fifth Circuit.

Robert James TENNARD, Petitioner-Appellant,
v.
Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellee.

No. 00-20915.

Jan. 3, 2003.

Mandy Welch, Burr & Welch, Houston, TX, for Petitioner-Appellant.

*477 Charles A. Palmer, Asst. Atty. Gen., Austin, TX, for Respondent- Appellee.

Appeal from the United States District Court for the Southern District of Texas; Lynn N. Hughes, Judge.

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before SMITH, BENAVIDES and DENNIS, Circuit Judges.

BENAVIDES, Circuit Judge:

The Supreme Court of the United States, by order in *Tennard v. Cockrell*, --- U.S. ----, 122 S.Ct. 70, 151 L.Ed.2d 4 (2002), granted appellant's petition for a writ of *certiorari*, vacated the judgment, [FN1] and remanded it to us for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which was decided after the issuance of our opinion in this case. In *Atkins*, the Supreme Court held that the Eighth Amendment prohibits the application of the death penalty to mentally retarded persons. Tennard has never argued that the Eighth Amendment prohibits his execution. Instead, Tennard argued that the jury instructions did not provide a vehicle for giving mitigating effect to his evidence of mental retardation in violation of the Eighth Amendment. Accordingly, because Tennard has not raised the Eighth Amendment claim addressed in *Atkins*, such a claim is not properly before us. *Cf. Smith v. Cockrell*, 311 F.3d 661, 684 (5th Cir.2002) (declining to address *Atkins* claim raised for the first time on appeal); *Soffar v. Dretke*, 311 F.3d 915, 923 (8th Cir.2002) (declining to address *Atkins* claim because petitioner did not raise an Eighth Amendment claim in his federal habeas petition).

FN1. *Tennard v. Cockrell*, 284 F.3d 591 (5th Cir.2002).

Accordingly, we reinstate our panel opinion and AFFIRM the district court's judgment.

DENNIS, Circuit Judge, dissenting:

Although I agree with the panel majority that Tennard's claim under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), is not properly before this court because petitioner did not raise this claim in his district court habeas petition, I continue to dissent from the now restored panel opinion, *Tennard v. Cockrell*, 284 F.3d 591 (5th Cir.2002), for the reasons given in my dissent there.

317 F.3d 476

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284 F.3d 591
(Cite as: 284 F.3d 591)

United States Court of Appeals.
Fifth Circuit.

Robert James TENNARD, Petitioner-Appellant,
v.
Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellee.

No. 00-20915.

March 1, 2002.

Following affirmance of murder conviction and death sentence, 802 S.W.2d 678, state prisoner petitioned for habeas corpus. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., denied the petition, and petitioner requested a certificate of appealability (COA). The Court of Appeals, Benavides, Circuit Judge, held that: (1) petitioner failed to rebut the presumption of correctness afforded the state court's finding that there was "no evidence" of his mental retardation, though there was evidence that he had an I.Q. of 67, and (2) even assuming that petitioner rebutted that finding, his claim of *Penry* error, to the effect that the special issues submitted at the punishment phase did not provide the jury with a vehicle for giving mitigating effect to his evidence of mental retardation, failed where he made no showing at trial that the criminal act was attributable to this severe permanent condition.

Request denied.

Dennis, Circuit Judge, filed a dissenting opinion.

West Headnotes

[1] Habeas Corpus 818
197k818 Most Cited Cases

To make a substantial showing of the denial of a constitutional right, as required to obtain a certificate of appealability (COA), a habeas petitioner must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further. 28 U.S.C.A. § 2253(c)(2).

[2] Habeas Corpus 818
197k818 Most Cited Cases

Any doubt regarding whether to grant a certificate of appealability (COA) is resolved in favor of the habeas petitioner, and the severity of the penalty may be considered in making this determination. 28 U.S.C.A. § 2253(c)(2).

[3] Habeas Corpus 818
197k818 Most Cited Cases

To determine whether a certificate of appealability (COA) should be granted for a habeas appeal, court must be mindful of the deferential scheme set forth in the Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C.A. §§ 2253(c)(2), 2254(d).

[4] Habeas Corpus 452
197k452 Most Cited Cases

A state court's decision is deemed contrary to clearly established federal law, so as to warrant a grant of habeas corpus, if it reaches a legal conclusion in direct conflict with a prior decision of the Supreme Court or if it reaches a different conclusion than the Supreme Court based on materially indistinguishable facts. 28 U.S.C.A. § 2254(d).

[5] Habeas Corpus 450.1
197k450.1 Most Cited Cases

A state court's decision constitutes an unreasonable application of clearly established federal law, so as to warrant a grant of habeas corpus, if it is objectively unreasonable. 28 U.S.C.A. § 2254(d).

[6] Sentencing and Punishment 1780(3)
350Hk1780(3) Most Cited Cases

In reviewing a *Penry* claim of absence of instructions in a capital murder case informing jury that it could consider and give effect to mitigating evidence of defendant's mental retardation, court must determine whether the mitigating evidence introduced at trial was constitutionally relevant and beyond the effective reach of the jury, and to be constitutionally relevant, the evidence must show: (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, and (2) that the criminal act was attributable to this severe permanent condition.

[7] Habeas Corpus 770
197k770 Most Cited Cases

Habeas petitioner, arguing *Penry* error in that the special issues submitted at the punishment phase of capital murder trial did not provide the jury with a vehicle for giving mitigating effect to his evidence of mental retardation, failed to rebut the presumption of correctness afforded the state court's finding that there was "no evidence" of his mental retardation, though there was evidence that he had an I.Q. of 67, where there was no evidence introduced with respect to the meaning of the score and defendant did not argue to the jury that he was mentally retarded. 28 U.S.C.A. § 2253(c)(2).

[8] Habeas Corpus 508
197k508 Most Cited Cases

Even assuming that habeas petitioner rebutted with clear and convincing evidence the state court's finding of no evidence of mental retardation, his claim of *Penry* error, to the effect that the special issues submitted at the punishment phase of capital murder trial did not provide the jury with a vehicle for giving mitigating effect to petitioner's evidence of mental retardation, failed where he made no showing at trial that the criminal act was attributable to this severe permanent condition.

[9] Sentencing and Punishment 1780(3)
350Hk1780(3) Most Cited Cases

It is not simply the fact that one is labeled mentally retarded that establishes a *Penry* claim of error to the effect that the special issues submitted at the punishment phase of capital murder trial did not provide the jury with a vehicle for giving mitigating effect to petitioner's evidence of mental retardation; defendant must show there is a nexus between the alleged mental retardation and the capital murder.

*592 Mandy Welch (argued), Burr & Welch, Houston, TX, for Petitioner- Appellant.

Charles A. Palmer, Asst. Atty. Gen. (argued), Austin, TX, for Respondent- Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before SMITH, BENAVIDES and DENNIS, Circuit Judges.

BENAVIDES, Circuit Judge:

Petitioner Robert James Tennard (Tennard), convicted of capital murder in Texas and sentenced to death, requests from this Court a Certificate of Appealability (COA) pursuant to 28 U.S.C. § 2253(c)(2). Tennard's sole argument is that the jury was unable to give effect to the mitigating evidence of his mental retardation when answering the special issue with respect to future dangerousness at the punishment phase. Finding that Tennard has not made a substantial showing of the denial of a constitutional right, we DENY the COA.

I. FACTUAL AND PROCEDURAL HISTORY

On October 17, 1985, Tennard was indicted for the capital murder of Larry Neblett (Neblett) committed during the course of a robbery. The following evidence *593 introduced at trial established that Tennard and two others murdered two men during a robbery. [FN1]

FN1. The facts are taken directly from the opinion of the Texas Court of Criminal Appeals. *Ex parte Tennard*, 960 S.W.2d 57, 58-59 (Tex.Crim.App.1997).

Tennard lived behind the home of the two victims, and he knew them. The victims had invited Tennard and his two friends into their home approximately fifteen to thirty minutes before they were attacked. Tennard stabbed one of the victims fifteen times with a knife while one of Tennard's friends killed the other victim with a hatchet. Tennard played a dominant role in disposing of the victims' stolen property. Tennard presented an alibi defense, and he presented other evidence from which the jury might have concluded that another person possibly could have committed the murders. Based on the above evidence, the jury found him guilty of capital murder.

The evidence from the punishment hearing shows Tennard had been on parole from a felony rape conviction for less than four months when he committed the instant offense. The rape victim testified Tennard and two others forced her into a car while she was at a bus stop. Just after she was forced into the car, Tennard, who was displaying about a foot-and-a-half-long pipe wrench, threatened to kill her if she moved.

The victim testified Tennard and his friends took her to an abandoned apartment at a government project where Tennard forced her to engage in oral, vaginal and anal sex with him. After that, Tennard's two friends took turns sexually assaulting her.

Tennard and his friends then took the victim to another house where he began using drugs and discussing "pimping out" the victim. She asked Tennard if she could go to the restroom to take a bath, which he allowed her to do. She escaped through a window, and Tennard was arrested later that day. The victim testified Tennard appeared to be the leader during her ordeal. Defense counsel impeached the victim's testimony with a prior statement she made from which the jury could have inferred one of Tennard's accomplices was the leader.

Tennard's parole officer testified that a Texas Department of Correction's (TDC) record from his prior incarceration indicated he had an intelligence quotient (I.Q.) of 67. During cross-examination of this witness, the State introduced the TDC record into evidence. This document appears to have been prepared approximately five years before Tennard committed the capital murder offense, and there is a notation providing Tennard had an I.Q. of 67. However, the parole officer could not say who prepared the report or conducted the I.Q. test. This is all the evidence presented at Tennard's trial with respect to his "mental retardation." [FN2] The term "mental retardation" is not mentioned anywhere in this record.

FN2. During cross-examination, Tennard's parole officer testified as follows:
Q. [T]his doesn't purport to be any report by any particular psychologist or anything, does it?
A. No, sir.
Q. It's basically just sort of, as its says, social and criminal history of [Tennard]?
A. Right, sir.
Q. And it says, there's basically a line for IQ, and it says 67?
A. That's correct. Q. And it has no indication of who may have given those tests or under what conditions?
A. No sir, it doesn't.

Tennard also introduced evidence that he was twenty-two years of age when he *594 committed this offense and that he had spent most of his formative years incarcerated.

At the conclusion of the punishment phase, the jury affirmatively answered the special issues. Pursuant to Texas law, the trial court sentenced him to death. On direct appeal, the Texas Court of Criminal Appeals affirmed the conviction and sentence. *Tennard v. State*, 802 S.W.2d 678 (Tex.Crim.App.1990), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2914, 115 L.Ed.2d 1077 (1991). Tennard filed an application for state habeas relief that ultimately was denied by the Texas Court of Criminal Appeals. *Ex parte Tennard*, 960 S.W.2d 57 (Tex.Crim.App.1997).

Subsequently, Tennard filed the instant federal habeas petition in district court. The district court denied Tennard's petition and his request for a COA. Tennard now requests a COA from this Court.

II. ANALYSIS

A. STANDARDS OF REVIEW

[1][2] Tennard filed his section 2254 application for habeas relief on December 18, 1998, which was after the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA). His application is therefore subject to the AEDPA. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997). Under the AEDPA, a petitioner must obtain a COA. 28 U.S.C. § 2253(c)(2). A COA will be granted only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4, 103 S.Ct. 3383, 3394 n. 4, 77 L.Ed.2d 1090 (1983) (citation and internal quotation marks omitted). Any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir.1997).

[3][4][5] To determine whether a COA should be granted, we must be mindful of the deferential scheme set forth in the AEDPA. *Hill v. Johnson*, 210 F.3d 481, 484-85 (5th Cir.2000). Pursuant to 28 U.S.C. § 2254(d), we defer to a state court's adjudication of petitioner's claims on the merits unless the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A state court's decision is deemed contrary to clearly established federal law if it reaches a legal conclusion in direct conflict with a prior decision of the Supreme Court or if it reaches a different conclusion than the Supreme Court based on materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1519-20, 146 L.Ed.2d 389 (2000). A state court's decision constitutes an unreasonable application of clearly established federal law if it is objectively

unreasonable. *Id* at 1521.

Further, state court findings of fact are presumed to be correct, and the petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. Section 2254(e)(1).

B. JURY INSTRUCTIONS

*595 Relying on *Penry v. Lynaugh*, [FN3] Tennard argues that the special issues submitted at the punishment phase did not provide the jury with a vehicle for giving mitigating effect to his evidence of mental retardation. Specifically, Tennard contends that a juror answering the two special issues affirmatively but nevertheless believing a life sentence appropriate (based on the evidence of his mental retardation) had no vehicle to express this belief.

FN3. 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

[6] In reviewing a *Penry* claim, we must determine whether the mitigating evidence introduced at trial was constitutionally relevant and beyond the effective reach of the jury. *Davis v. Scott*, 51 F.3d 457, 460 (5th Cir.1995). To be constitutionally relevant, "the evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, ... and (2) that the criminal act was attributable to this severe permanent condition." *Id.* at 460-61 (internal quotation marks and citation omitted).

As previously set forth, during the punishment phase, Tennard called his parole officer, William Kinard (Kinard), as a witness. Kinard testified that an I.Q. test was administered to inmates at TDC as a matter of course. Kinard also testified that a document from TDC provided Tennard's I.Q. was 67. Kinard was the only defense witness who testified before the jury during the punishment phase.[FN4]

FN4. The record shows that the trial court did not allow defense counsel to call a witness who would have testified that one of Tennard's accomplices received a life sentence for the instant offense.

During defense counsel's closing argument, he referred to Tennard's "low" I.Q. several times:

> Then I called a witness who testified he's Tennard's parole officer. Uncontroverted evidence that when Robert Tennard was examined, when he got out of the penitentiary, by the officials who determined how to classify him, how to treat him, the same information that was communicated to his parole officer, what to do for him, how to help him when he's out on parole. Information that the prison psychiatrist had, the information that they gave is that Tennard has got a 67 IQ. The same guy that told this poor unfortunate woman [the rape victim] that was trying to work that day, "Well, if I let you in there, will you leave?" And he believed her. This guy with the 67 IQ, and she goes in and, sure enough, she escapes, just like she should have. That is uncontroverted testimony before you, that we have got a man before us that has got *an intelligence quotient ... that is that low.*
>
> • • •
>
> Now you're charged with acting as Robert Tennard's peers. You have to judge him as his peers. That's going to be hard for you to do. None of you grew up where he grew up. Only one of you is black and none of you are suffering from a 67 IQ. So you're going to have to try to judge this man and decide what his punishment would be as his peers. And I would ask you as you do that, as is your responsibility, you take into consideration the things that you have been informed of by me and by things the prosecutor has told you in judging Robert Tennard....
>
> • • •
>
> And don't let [the prosecutor] get up here and tell you to put blinders on and *596 just answer the questions in a vacuum. The law allows you to take all the things into consideration that I talked to you about--attitude toward the death penalty, take all these things into consideration, the 67 IQ--in deciding how you answer the those questions. You have a right to do that under Texas law. Don't let [the prosecutor] tell you you can't just look at the evidence and just answer the questions. You are allowed more latitude than that. Remember, what you do here will be forever lasting one way or the other.

(emphasis added)

As the record reveals, although defense counsel presented evidence of Tennard's low I.Q., he did not argue that Tennard was mentally retarded. The Court of Criminal Appeals recognized that the term "mental retardation" was never mentioned in the trial record. *Ex parte Tennard*, 960 S.W.2d at 59. Indeed, a majority of the Court of Criminal Appeals found "no evidence in this record that [Tennard] is mentally retarded." *Id.* at 61.[FN5] Under the AEDPA, we are required to afford a presumption of correctness to this factual finding, 28 U.S.C. § 2254(e)(1). *see Davis*, 51 F.3d at 461 n. 4 (affording a presumption of correctness to state court's finding of no evidence that petitioner was mentally retarded).

FN5. Additionally, in a concurring opinion, Judges Meyers and Price concluded that there was not enough evidence of mental retardation in the record to support Tennard's claim. 960 S.W.2d at 67 n. 9. Judge Baird dissented, opining that Tennard's I.Q. of 67 was "presumptive of his mental retardation." *Id.* at 71.

This Court has explained that evidence of a low I.Q. does not constitute a uniquely severe condition or is within the jury's effective reach pursuant to the teachings of *Penry*. *Andrews v. Collins*, 21 F.3d 612, 629-30 (5th Cir.1994); *Lackey v. Scott*, 28 F.3d 486, 489-90 (5th Cir.1994).

Nevertheless, Tennard contends that an individual with an I.Q. of 67 has significantly below normal functioning and is presumptively mentally retarded. Thus, he argues, such an individual is less able than a normal adult to control his conduct, evaluate the consequences of his conduct, and learn from his mistakes. To support this proposition, Tennard points out that the American Association of Mental Retardation (AAMR) classified individuals with an I.Q. score of 75 and below as presumptively retarded. *See* AAMR Mental Retardation: Definition, Classification, and Systems of Supports 14 (9th ed.1992).

[7] The flaw in Tennard's argument is that he did not establish or argue to the jury that he was mentally retarded. A prison document provided that Tennard had an I.Q. score of 67. There was no evidence introduced with respect to the meaning of the score, nor its relation to Tennard's moral culpability. As stated, the term "mental retardation" was never articulated before the jury. This dearth of evidence is in stark contrast to the "substantial mitigating evidence that Penry was mentally retarded." *Penry v. Johnson*, 261 F.3d 541 (5th Cir.2001). Under these circumstances, we are constrained to hold that Tennard has not rebutted the presumption of correctness afforded the state court's finding that there was "no evidence" of Tennard's mental retardation.

[8] Even assuming *arguendo* for purposes of this appeal that Tennard has rebutted with clear and convincing evidence the state court's finding of no evidence of mental retardation, his claim must fail because he made no showing at trial that the criminal act was attributable to this severe permanent condition.

*597 [9] We have recognized it is not simply the fact that one is labeled mentally retarded that establishes a *Penry* claim. *See Robison v. Johnson*, 151 F.3d 256, 264 (5th Cir.1998) (citing *Robison v. Texas*, 888 S.W.2d 473 (Tex.Crim.App.1994)).[FN6] A petitioner must show there is a nexus between the severe permanent condition (here, alleged mental retardation) and the capital murder. As in Tennard's case, in *Boyd v. Johnson*, the only evidence of mental retardation introduced at trial was the petitioner's I.Q. score of 67 contained in his prison packet. 167 F.3d 907, 912 (5th Cir.1999). We stated that even assuming that the I.Q. score of 67 demonstrates a "'uniquely severe permanent handicap,' it does not establish 'that the criminal act was attributable to this severe permanent condition.'" *Id.* (quoting *Davis*, 51 F.3d at 461). Moreover, we expressly have rejected the notion that "a nexus is inherent between any evidence of mental retardation and a crime." *Harris v. Johnson*, 81 F.3d 535, 539 n. 11 (5th Cir.1996).

FN6. *See also Davis*, 51 F.3d at 460 (explaining that "evidence of a disadvantaged background, or emotional and mental problems, does not raise, *ipso facto*, a *Penry* claim").

Tennard is precluded from establishing a *Penry* claim because he failed to introduce at trial any evidence indicating that the capital murder was in any way attributable to his I.Q. of 67. *See Cranky Collins*, 19 F.3d 172, 175-76 (5th Cir.1994) (stating that it is well established capital defendants cannot base a *Penry* claim upon evidence that could have been, but was not, proffered at trial).

For the above reasons, we conclude that Tennard has not made a substantial showing of the denial of a constitutional right and DENY his request for a COA.

DENIED.

DENNIS, Circuit Judge, Dissenting:

I respectfully dissent.

The threshold question under AEDPA is whether Tennard seeks to apply a rule of law that was clearly established at the time his state-court conviction became final. *Williams v. Taylor*, 529 U.S. 362, 390, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). That

question is easily answered because the merits of his claim are squarely governed by *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)(*Penry I*). [FN1] Because *Penry I* qualifies as "clearly established Federal law, as determined by the Supreme Court," that precedent "dictated" that the Texas Court of Criminal Appeals apply that decision in entertaining Tennard's *Penry* claim. *See Williams*, 529 U.S. at 390, 120 S.Ct. 1495 (citing *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1984)).

FN1. Tennard's direct state appeal was decided November 28, 1990, and his motion for rehearing was overruled January 30, 1991. *Tennard v. State*, 802 S.W.2d 678 (Tex.Crim.App.1991).

Tennard is entitled to relief because the Texas Court of Criminal Appeals's adjudication rejecting his *Penry I* claim resulted in a decision that was (1) "contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," and (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2) (West Supp.2001).

At the penalty phase of the trial, Tennard introduced evidence "on his 'mental retardation.' " *Ex parte Tennard*, 960 S.W.2d 57, 59 (Tex.Crim.App.1997) (en banc). The evidence of Tennard's mental retardation consisted of evidence that he had an I.Q. of 67, that he was a "follower" *598 of others, and that he was easily duped. [FN2] *Id.* at 58-59. Nevertheless, the state court of criminal appeals rejected Tennard's *Penry I* claim on two grounds. First, that court found that there was "no evidence in the record that applicant is mentally retarded." *Id.* at 61. Second, even assuming that the evidence of Tennard's I.Q. of 67 and other evidence was evidence of mental retardation, the court of criminal appeals rejected his *Penry I* claim because (1) there was no evidence Tennard's low I.Q. rendered him unable to appreciate the wrongfulness of his conduct or to learn from his mistakes or diminished his ability to control his impulses or evaluate the consequences of his conduct; (2) therefore, there was no danger that the jury would have given any mitigating qualities of the evidence of Tennard's low I.Q. only aggravating effect in answering special issue two (whether there was a probability that he would be a continuing threat to society); and (3) the special issues did not place mitigating qualities of the evidence of applicant's low I.Q. beyond the effective reach of the jury: "[t]he jury could have used this evidence for a 'no' answer to the first special issue on 'deliberateness,' " and "the jury could have used the low I.Q. evidence to conclude [that Tennard] was a 'follower' instead of a 'leader.' " *Id.* at 62-63. Thus, "[t]here was ample room within special issue two for the jury to give effect to any mitigating qualities of applicant's low I.Q. evidence." *Id.*

FN2. In a previous offense, Tennard was easily fooled into allowing a victim to go to the restroom and escape because he believed her promise not to run away. *Ex parte Tennard*, 960 S.W.2d at 58-59.

I.

The finding of fact of the Texas Court of Criminal Appeals that there was no evidence in the record that Tennard is mentally retarded was patently an "unreasonable [factual] determination." " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Fed.R.Evid. 401. The evidence in the record of Tennard's child-like credulity and I.Q. of 67 had a tendency to make the existence of his mental retardation more probable that it would be without that evidence. [FN3] In a capital murder case the fact that mental retardation is part of the defendant's character and background is relevant mitigating evidence that the jury must be allowed to consider and to give effect to in deciding whether to inflict the death penalty. *Penry I*, 492 U.S. at 316-22, 327-28, 109 S.Ct. 2934 (citing *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *McCleskey v. Kemp*, 481 U.S. 279, 304, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)). Therefore, the defendant's mental retardation is a fact of consequence to the determination of the death penalty action and any evidence that makes its existence more probable is relevant mitigating evidence of that mental condition. Because there plainly is evidence in the record of mental retardation in Tennard's character and background, the court of criminal appeals's unreasonable finding to the contrary in adjudication of Tennard's claim "resulted in a decision that was based on *599 an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Consequently, under § 2254(d)(2), Tennard's application for a COA to pursue a writ of habeas corpus should be granted.

FN3. Findings of fact by panels of this court in other cases are not binding upon this panel

under the doctrine of stare decisis. *See, e.g.*, 18 James Wm. Moore et al., *Moore's Federal Practice* § 134.05[3] (3d ed. 1999) ("The doctrine of stare decisis does not apply to the determination of the facts of a case.").

2.

In *Penry I*, the Supreme Court held that (1) "at the time Penry's conviction became final, it was clear from *Lockett* and *Eddings* that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty[.]" 492 U.S. at 318, 109 S.Ct. 2934; (2) "[t]he rule Penry [sought]--that when such mitigating evidence [of his mental retardation and abused childhood] is presented, Texas juries must ... be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed--is not a 'new rule' under *Teague* because it is dictated by *Eddings* and *Lockett*[.]" *Id.* at 318-19, 109 S.Ct. 2934; (3) "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer[-][t]he sentencer must also be able to consider and give effect to that evidence in imposing sentence[.]" *Id.*; (4) "[i]n order to ensure reliability in the determination that death is the appropriate punishment in a specific case, the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime[.]" *Id.* at 328, 109 S.Ct. 2934; and (5) therefore, "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused [childhood] background by declining to impose the death penalty, ... the jury was not provided with a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision." *Id.* at 328, 109 S.Ct. 2934 (internal quotations and citations omitted).

Thus, the Supreme Court in *Penry I* agreed with Penry's argument "that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its reasoned moral response to that evidence in determining whether death was the appropriate punishment." *Id.* at 322, 109 S.Ct. 2934. The Court explained in detail why it rejected the State's contrary argument that the jury was able to consider and give effect to all of Penry's mitigating evidence in answering the three special issues. *Id.*

The first special issue, which asked whether the defendant acted "deliberately and with the reasonable expectation that the death of the deceased ... would result," impermissibly limited the jury's function because the term "deliberately" had not been defined by the Texas Legislature, the Texas Court of Criminal Appeals, or the trial court's instructions. *Id.* at 322, 109 S.Ct. 2934. Assuming that the jurors "understood 'deliberately' to mean something more than ... 'intentionally' committing murder, those jurors may still have been unable to give effect to Penry's mitigating evidence in answering the first special issue." *Id.* The Court concluded that the jury could not give full effect to Penry's evidence under the first special issue because "deliberately" was not defined "in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability." *Id.* at 323, 109 S.Ct. 2934. Thus, Penry's "mitigating evidence of mental *600 retardation and childhood abuse ha[d] relevance to his moral culpability beyond the scope of the special issues...." *Id.* at 322, 109 S.Ct. 2934. Consequently, the Court concluded, unless there are "jury instructions defining 'deliberately' in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue." *Id.* at 323, 109 S.Ct. 2934. "Thus, we cannot be sure that the jury's answer to the first special issue reflected a reasoned moral response to Penry's mitigating evidence." *Id.* (internal quotation omitted).

The second special issue, which asked "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," permitted the jury to consider and give effect to Penry's mental retardation and childhood abuse as "relevant only as an aggravating factor...." *Id.* But the second special issue was not inadequate simply because it only gave effect to Penry's evidence as an aggravating factor: it was dysfunctional for the independent reason that it did not allow the jury to give "full consideration [to the] evidence that mitigates against the death penalty." *Id.* at 328, 109 S.Ct. 2934. "The second special issue, therefore, did not provide a vehicle for the jury to give mitigative effect to Penry's evidence of mental retardation and childhood abuse." *Id.* at 324, 109 S.Ct. 2934.

As the justices who dissented in part in *Penry* acknowledged, the *Penry* majority held "that the constitutionality [of a death sentence under the Texas special issues] turns on whether the questions allow mitigating factors not only to be considered (and, of course, given effect in answering the questions), but

also to be given effect in all possible ways, including ways that the questions do not permit." *Id.* at 355, 109 S.Ct. 2934 (Scalia, J., dissenting in part and concurring in part). Or, as the majority concluded, "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, ... the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentence." *Id.* at 328, 109 S.Ct. 2934.

The Court in *Penry I* expressly rejected the State's argument that any defect in the jury instructions should be disregarded because Penry's defense counsel was able to argue that jurors who believed that Penry, because of his mitigating evidence of mental retardation and childhood abuse, did not deserve a death sentence should vote "no" on one of the special issues regardless of the State's proof on that the answer. *Id.* at 325, 109 S.Ct. 2934. The Court pointed out that "the prosecution countered by stressing that the jurors had taken an oath to follow the law, and that they must follow the instruction they were given in answering the special issues." *Id.* "In light of the prosecutor's argument, and in the absence of appropriate jury instructions," the Court concluded, "a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 326, 109 S.Ct. 2934.

Further, the Court reaffirmed and quoted its opinion in *McCleskey v. Kemp*: " 'In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant *601 evidence that might cause it to decline to impose the death sentence.' " *Id.* at 327, 109 S.Ct. 2934 (quoting 481 U.S. 279, 304, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)). Consequently, the Court concluded:

> Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense.... In order to ensure reliability in the determination that death is the appropriate punishment in a specific case, the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.

Id. at 327-28, 109 S.Ct. 2934 (internal citations and quotations omitted).

Tennard is entitled to relief under 28 U.S.C. § 2254(d)(1) because the decision of the Texas Court of Criminal Appeals rejecting his *Penry I* claim is based on rationales that were rejected generally and specifically by *Penry I*. In general, the Supreme Court in *Penry I* agreed with Penry's argument "that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment [and] reject[ed] the State's contrary argument that the jury was able to consider and give effect to all of Penry's mitigating evidence in answering the special issues without any jury instructions on mitigating evidence." *Penry I*, 492 U.S. at 322, 109 S.Ct. 2934. The decision of the Texas Court of Criminal Appeals contradicted that basic *Penry I* holding by deciding that the special issues allowed the jury to consider and give effect to Tennard's mitigating evidence of mental retardation.

Moreover, the decision of the Texas Court of Criminal Appeals was contrary to *Penry I* in at least three specific ways. First, in contradiction of *Penry I*, the Texas Court of Criminal Appeals held that, in order have his mitigating evidence of mental retardation considered and given effect by the jury, Tennard must introduce additional evidence that his low I.Q. rendered him unable to appreciate the wrongfulness of his conduct or to learn from his mistakes or diminished his ability to control his impulses or evaluate the consequences of his conduct. The state-court's reading of that additional requirement into *Penry I* is based on a misinterpretation of dicta [FN4] in *Penry I* and is contrary to *Penry I*'s holding. [FN5] As *Penry I* repeatedly made *602 clear, when a state's capital punishment scheme assigns a jury the role of sentencer, any and all mitigating evidence, including evidence of the defendant's mental retardation, must be presented to the jury. *Id.* at 328, 109 S.Ct. 2934, and it is exclusively the prerogative of the jury to consider, weigh, and decide what effect should be given to that evidence in its determination of whether to inflict the death penalty. *See id.* at 323, 328, 109 S.Ct. 2934.

FN4. The statutory phrase "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412, 120 S.Ct. 1495. *See also infra* note * and accompanying text.

FN5. In *Penry I* the Court observed in passing that "[i]f the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.' " *Penry I*, 492 U.S. at 319, 109 S.Ct. 2934 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)). This is merely a statement of the underlying moral and social principles requiring that a potential death sentencer must consider and give effect to evidence of the defendant's mitigating evidence. This passage cannot be read with any intellectual honesty as being part of or essential to the *Penry I* holding or a finding or judicial notice of an adjudicative fact in *Penry I*. *See* Fed.R.Evid. 201.

Second, the Texas Court of Criminal Appeals also held, contrary to *Penry I*, that the Supreme Court's decision does not apply under special issue two in the absence of evidence tending to cause the jury to give *only* aggravating effect to the evidence of defendant's low I.Q., *Tennard*, 960 S.W.2d at 62; and that "[t]here was ample room within special issue two for the jury to give effect to any mitigating qualities of applicant's low IQ evidence," such as the evidence in the present case and in defendant's prior felony rape conviction that he was a "follower" instead of a "leader" in the commission of both crimes with others. *Id.* at 62-63. However, the Supreme Court in *Penry I* plainly held that the second special issue was not inadequate simply because it only gave effect to Penry's evidence as an aggravating factor; it was dysfunctional independently because it did not allow the jury to give full effect to Penry's mitigating evidence. *Penry I*, 492 U.S. at 322, 109 S.Ct. 2934.

Third, the state court of criminal appeals held, contrary to *Penry I* that the special issues did not place mitigating qualities of the evidence of Tennard's low I.Q. beyond the effective reach of the jury because "[t]he jury could have used this evidence for a 'no' answer to the first special issue on 'deliberateness.' " *Tennard*, 960 S.W.2d at 62. The Supreme Court in *Penry I* specifically rejected the very same rationale or argument: "Penry's mental retardation was relevant to the question whether he was capable of acting 'deliberately,' but it also had relevance to [his] moral culpability beyond the scope of the special verdict question[n]." *Penry I*, 492 U.S. at 322, 109 S.Ct. 2934 (citing *Franklin v. Lynaugh*, 487 U.S. 164, 185, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988)) (alteration in original).

Finally, in the concluding paragraph of Section III of *Penry I*, the Supreme Court again expressly rejected all three of the rationales set forth by the Texas Court of Criminal Appeals in the present case for denying Tennard a writ of habeas corpus:

> In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision. Our reasoning in *Lockett* and *Eddings* thus compels a remand for resentencing so that we do not risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Id. at 328, 109 S.Ct. 2934 (internal quotations and citations omitted). In short, the state-court decision in the present case contradicts the holding set forth in *603 *Penry I* because each ruling or rationale set forth in *Tennard* was rejected repeatedly by *Penry I* as not being a constitutionally sound basis for upholding a death penalty under the Texas special issues scheme because that scheme inherently prevents the sentencing jury from fully considering and giving effect to mitigating evidence of mental retardation in determining whether to inflict the death penalty.

3.

The flawed majority opinion reaches an incorrect result because it ignores the authoritative interpretation of 28 U.S.C. § 2254(d) set forth by the Supreme Court in *Williams* for deciding whether the adjudication of Tennard's *Penry I* claim by the Texas Court of Criminal Appeals resulted in a decision that was contrary to clearly established Federal law, as determined by the Supreme Court.

Instead of following the teachings of *Williams*, as set forth and applied in the foregoing sections of this dissent, the majority relies upon and applies prior decisions of this circuit which were based on the dicta, as opposed to the holding, of *Penry I*. The majority concludes that a petitioner, such as Tennard, who makes a *Penry I* claim, "must show there is a nexus between the severe permanent condition (here, alleged mental retardation) and the capital murder." Maj. Op. at 596-97 (citing *Davis v. Johnson*, 167 F.3d 907, 912

(5th Cir.1999); *Harris v. Johnson*, 81 F.3d 535, 539 n. 11 (5th Cir.1996); *Davis v. Scott*, 51 F.3d 457, 461 (5th Cir.1995)). The cases upon which the majority relies for this nexus rule, and their source, *Madden v. Collins*, 18 F.3d 304, 307 (5th Cir.1994), are based upon the dicta, rather than the holding, of *Penry I*. [FN6]

FN6. The Texas Court of Criminal Appeals relied upon the same dicta for a somewhat similar nexus rule. *See* discussion *supra* p. 598.

The Supreme Court in *Penry I* concluded that the rule sought by Penry--"that when mitigating evidence of mental retardation or abused childhood is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed"--was not a "new rule" under *Teague* because it was dictated by *Eddings* and *Lockett*. *Penry I*, 492 U.S. at 318-19. The Court went on to explain the moral and social principles underlying those decisions as follows:

> Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. Moreover, *Eddings*, makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Only then can we be sure that the sentencer has treated the defendant as a uniquely individual human bein[g] and has made a reliable determination that death is the appropriate sentence.
>
> Thus, the sentence imposed at the penalty stage would reflect a reasoned *moral* response to the defendant's background, character, and crime.

*604 *Penry I*, 492 U.S. at 319, 109 S.Ct. 2934 (internal quotations and citations omitted) (alterations and emphasis in original). Although this passage is enlightening and invaluable to a deeper understanding of the jurisprudence, it is clearly dicta and not part of the holding of *Penry I* which consisted principally of the rule sought by Penry that the Court found had already been announced by *Eddings* and *Lockett*. The Court's explanation of the underlying ethos of prior decisions was dicta and not the holding of *Penry I*.

Assuming that the nexus rule was a proper circuit court embroidery based upon the dicta of *Penry I* and therefore was at one time a binding rule in this circuit, it cannot serve as a precedent in the present case. The Supreme Court made it clear in *Williams* that the statutory phrase, "clearly established Federal law, as determined by the Supreme Court of the United States," in 28 U.S.C. § 2254(1), "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412, 120 S.Ct. 1495 ("[A]s the statutory language makes clear, § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence."). [FN7] Consequently, *Williams* dictates that we determine whether a state-court habeas corpus adjudication resulted in a decision that was contrary to clearly established Federal law by applying the holdings of the Supreme Court decisions, rather than Supreme Court dicta or our own decisions based on such dicta. Because the nexus rule applied by the majority is based on the dicta of *Penry I*, rather than its holding or the holdings of *Eddings* and *Lockett*, which *Penry I* applied, it should not be applied in the present case.

FN7. *See also Williams*, 529 U.S. at 389-90 & n. 15, 120 S.Ct. 1495 (Stevens, J., concurring, joined by Justices Souter, Ginsburg, and Breyer)("Otherwise the federal law determined by the Supreme Court of the United States might be applied by the federal courts one way in Virginia and another way in California. In light of the well-recognized interest in ensuring that federal courts interpret federal law in a uniform way, we are convinced that Congress did not intend the statute to produce such a result.... Indeed, a contrary rule would be in substantial tension with the interest in uniformity served by Congress' modification in AEDPA of our previous habeas jurisprudence--now the law on habeas review must be 'clearly established' by this Court alone.... It would thus seem somewhat perverse to ascribe to Congress the entirely inconsistent policy of perpetuating disparate readings of our decisions under the guise of deference to anything within a conceivable spectrum of reasonableness.") (citations omitted).

For the foregoing reasons the decision of the Texas Court of Criminal Appeals was contrary to the clearly established holding of *Penry I* and Tennard should be granted a COA to pursue habeas relief.

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